STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARNOLD EDWARD DEMANN,

Defendant-Appellant.

UNPUBLISHED
August 23, 2007

No. 268657
Allegan Circuit Court
LC No. 05-014225-FH

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of using a building as a location to manufacture methamphetamine, MCL 333.7401c(1)(a), and possessing chemicals or laboratory equipment for the purpose of manufacturing methamphetamine, MCL 333.7401c(1)(b). Pursuant to MCL 333.7413(2), he was sentenced as a repeat controlled-substance offender to 42 to 240 months in prison. We affirm.

Defendant had permission to use a barn on his parent's farm. Defendant is a mechanic and purportedly kept his tools in the barn. He also claimed to have held cookouts at the barn with his friends. However, an anonymous informant told the police that defendant was actually "cook[ing]" methamphetamine at the location. The police went to a tenant house on the farm and asked for permission to search the barn.[1] The search revealed numerous items used for the production of methamphetamine, although no methamphetamine was recovered at the scene. Thereafter, three police officers went to defendant's residence in Kalamazoo. The police informed defendant that he was not under arrest, and that he did not have to speak with them. Nonetheless, defendant admitted to the police that he had been "cooking" methamphetamine at the barn.

Defendant first contends that the trial court erred by giving an improper jury instruction on specific intent. We disagree. We review claims of instructional error de novo. *People v*

[1] The farm owners' granddaughter (defendant's niece) resided in the tenant house. The barn was located a short distance from the tenant house, and defendant's niece had access to the barn. However, she told the police that she never used the barn and that only defendant used the barn. Defendant did not contest the validity of the search.

Milton, 257 Mich App 467, 475; 668 NW2d 387 (2003). A preserved instructional error is nonconstitutional error. *People v Dumas*, 454 Mich 390, 408; 563 NW2d 31 (1997). We will not reverse on the basis of preserved, nonconstitutional error if the error was harmless. MCL 769.26; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

A trial court's jury instructions must include all of the elements of the charged offense, and must not exclude any material issues, defenses, or theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We examine the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

Defendant was convicted under MCL 333.7401c(1)(a) and (b), which provide in pertinent part:

> (1) A person shall not do any of the following:
>
> (a) Own, possess, or use a vehicle, building, structure, place, or area *that he or she knows or has reason to know* is to be used as a location to manufacture a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402.
>
> (b) Own or possess any chemical or any laboratory equipment *that he or she knows or has reason to know* is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402. [Emphasis added.]

We conclude that the trial court's instructions incorporated all of the elements of the charged offenses, including the elements of intent. *Canales*, *supra* at 574. The trial court instructed the jury that the prosecution had the burden of proving, among other things, that defendant "knew, or had reason to know" that the barn was being used to manufacture methamphetamine, and that defendant "knew, or had reason to know" that the chemicals or laboratory equipment were being used to manufacture methamphetamine. So long as the jurors were properly instructed that they were required to find that defendant "knew, or had reason to know" that the barn, chemicals, and laboratory equipment were being used to manufacture methamphetamine, there was no need to specifically instruct the jury on common-law specific intent. See *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004).[2] Indeed, when

[2] We note that defendant argues that the specific intent instruction, CJI2d 3.9, should have been given. This argument has no merit. In May 2005, the Michigan State Bar Standing Committee on Standard Criminal Jury Instructions deleted the specific intent instruction from the Michigan Criminal Jury Instructions. CJI2d 3.9, note. The committee's decision was premised on our Supreme Court's decision in *Maynor*, *supra*. "Since the offense instructions each contain any required *mens rea* element, the committee was of the view that CJI2d 3.9 is redundant at best and

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the language of the statute, itself, contains a knowledge or intent element, there is no reason for a separate and distinct jury instruction concerning criminal intent. *Id*. We find no basis for reversal because the trial court's instructions adequately protected defendant's rights by fairly presenting to the jury the issues to be tried. *Martin*, *supra* at 337-338.

Next, defendant argues that the trial court failed to afford him a hearing as guaranteed by the Deaf Persons' Interpreters Act (DPIA), MCL 393.501 *et seq.*, failed to inform him of his right to an interpreter, and failed to suppress his statements as required by the act. We disagree.

We review de novo "any question of the proper interpretation of the underlying criminal law." *Maynor*, *supra* at 294. "A trial court's decision regarding whether an individual is a deaf person is based upon factual findings, and we review that decision for clear error." *People v Brannon*, 194 Mich App 121, 128; 486 NW2d 83 (1992). "When construing a statute, this Court's goal is to give effect to the intent of the Legislature." *Maynor*, *supra* at 295. We begin by examining the language of the statute itself, and "[w]here the language is unambiguous, we give the words their plain meaning and apply the statute as written." *Id.*

The trial court did not err in concluding that defendant is not a "deaf person" as defined by the DPIA, MCL 393.502(b), and we are satisfied that the trial court conducted an adequate evidentiary hearing with regard to defendant's purported hearing impairment in this matter, *Brannon*, *supra* at 128. According to the evidence introduced below, defendant's hearing loss is approximately "50 percent" or "moderate." Moreover, there was substantial evidence that defendant was at least partially able to hear and understand spoken language, and that defendant did not primarily rely on other means of sensory input in communicating with others.

Quite simply, the record in this case does not show that defendant's hearing is "totally impaired." Nor does the record support the proposition that defendant's "primary means of receiving spoken language is through other sensory input," such as sign language or lip-reading. Because defendant does not qualify as a "deaf person" under MCL 393.502(b), he is not covered by the DPIA. Accordingly, MCL 393.505 is inapplicable in this case and did not bar defendant's admissions to the police. The trial court's decision regarding defendant's hearing impairment was not clearly erroneous. *Brannon*, *supra* at 128.[3]

Defendant also asserts that the trial court violated his constitutional rights to due process and confrontation, as well as his statutory rights, by failing to accommodate his hearing disability at trial. Further, defendant claims that he was denied the effective assistance of trial counsel by defense counsel's failure to request such accommodations. We disagree.

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potentially confusing at worst." CJI2d 3.9, note.

[3] We note that defendant's Fifth Amendment right to remain silent was not implicated on the facts of this case. See *Brannon*, *supra* at 129-130; see also *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). At the time defendant spoke to the police, he was not under arrest and he was not in custody. While the police must provide *Miranda* warnings to a suspect before custodial interrogation, *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001), it is clear that defendant in the present case was not in custody as he was free to leave or to end the interview with the police, *People v Eggleston*, 148 Mich App 494, 500; 384 NW2d 811 (1986).

Defendant's constitutional arguments would ordinarily be reviewed de novo. But because these arguments are unpreserved, we review them for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant's claim of ineffective assistance of counsel is similarly unpreserved, and our review is therefore limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant argues that the trial court violated his statutory rights under the Americans with Disabilities Act (ADA) and the DPIA "by failing to properly accommodate his disability." Defendant also asserts that the trial court violated his "Constitutional Due Process and Confrontation rights by the lack of accommodation." Defendant's arguments lack merit. As discussed previously, defendant is not a "deaf person" under DPIA. See MCL 393.502(e). As such, defendant was not entitled to the protections afforded to "deaf persons" under DPIA.

Moreover, we find that defendant has not carried his burden of establishing a violation of the ADA. "The Due Process Clause and the Confrontation Clause of the Sixth Amendment . . . both guarantee to a criminal defendant . . . the 'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.'" *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L Ed 2d 820 (2004), citing *Faretta v California*, 422 US 806, 819 n 15; 95 S Ct 2525; 45 L Ed 2d 562 (1975). "A [party] alleging a violation of the ADA carries the burden of proving a prima facie case." *Peden v Detroit*, 470 Mich 195, 202; 680 NW2d 857 (2004). Our Supreme Court has held that "[t]o satisfy this burden, the plaintiff must first show that he is a 'qualified individual with a disability' entitled to the ADA's protections." *Id.*, see also 42 USC 12112(a). 42 USC 12102(2) defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

Defendant's conclusory assertion that his hearing impairment qualifies him as a "qualified individual with a disability" under the ADA, just like his assertion that he is a "deaf person" under the DPIA, is unavailing. As noted above, the trial court conducted a thorough pretrial hearing to ascertain the degree of defendant's hearing impairment, and it was satisfied that defendant was able to understand the proceedings. Defendant has failed to demonstrate that he is a "qualified individual with a disability" under the ADA.

Moreover, we reject defendant's claim that the trial court failed to accommodate his disability. Defendant claims, without citation to authority, that the trial court had a duty to accommodate his disability. An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claim, nor may he give only cursory treatment of an issue with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Further, the record does not support defendant's argument that he was wrongly denied any necessary or required accommodation. Indeed, the trial court did accommodate defendant by allowing him to use hearing aids during trial. We perceive no error.

Nor did defense counsel render ineffective assistance in this regard. A defendant must prove that trial counsel's "performance was deficient" and that deficiency "prejudiced the defense" to sustain a claim of ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove ineffective assistance of counsel,

a defendant must show that but for defense counsel's deficient performance, the outcome of his trial would have been different. *Matuszak, supra* at 57-58. A defendant must overcome "a strong presumption that [defense] counsel's performance constituted sound trial strategy." *Id.* at 58. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to assert his rights under the ADA and DPIA. As previously discussed, defendant has failed to demonstrate that he is a "qualified individual with a disability" under the ADA or a "deaf person" under the DPIA. Defense counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court erroneously admitted out-of-court statements by a non-testifying informant by way of a police officer's testimony. Defendant claims that the challenged statements violated his rights under the Confrontation Clause. Because defendant's allegation of error under the Confrontation Clause is not preserved, we review this claim for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). However, the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford, supra* at 59 n 9. The United States Court of Appeals for the Sixth Circuit has held that statements by a confidential informant are testimonial and are thus subject to the dictates of the Confrontation Clause. *United States v Cromer*, 389 F3d 662, 675 (CA 6, 2004). In addition, this Court has previously held that "[t]he content of a confidential informant's tip is generally inadmissible as hearsay." *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). The substance of an informant's tip "is not justified to show an officer's state of mind, since the state of mind is not relevant." *Id.* at 383-384.

In this case, the prosecution examined the police officer as follows:

Q. Now, on December 6th of last year, 2004, were you working with the West Michigan Enforcement Team?

A. Yes, I was.

Q. And, on that date did you go to the residence or property located at 1839 8th Street in Martin?

A. Yes, we did.

Q. And is that in Allegan County?

A. Yes.

Q. What was your purpose in going there?

A. I received an anonymous phone call stating that [defendant] had been manufacturing methamphetamine at a barn behind that residence.

The challenged statement about the substance of the anonymous tip was an out-of-court statement by an unnamed informant, who did not testify at trial. Clearly, the police officer responded to this tip by going to the barn to look for evidence of methamphetamine production. Under the circumstances, where the statement was made directly to law enforcement, accused defendant of a crime, and appears to have been admitted to show that defendant committed the crime, we find the challenged statement to be testimonial hearsay. *Cromer*, *supra* at 675; see also *Crawford*, *supra* at 51 (stating that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"). We therefore conclude that the challenged statement was inadmissible to prove the truth of the matter asserted.

Nevertheless, defendant has failed to explain how the erroneous admission of the informant's statement affected his substantial rights. *Carines*, *supra* at 763-764. The officer's testimony regarding what he learned from the informant was brief and did not affect the outcome of the trial. The items discovered at the barn, in conjunction with defendant's admissions to the police, provided ample independent evidence of defendant's guilt notwithstanding the tainted testimony. Moreover, there is no indication in this case that "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 774. Reversal is not warranted on this basis.

Finally, defendant asserts that MCL 333.7401c(1) is unconstitutional. We disagree. "Statutes are presumed to be constitutional unless their unconstitutionality is readily apparent." *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004). "A party challenging the constitutionality of a statute has the burden of proving its unconstitutionality." *Id.* To prevail on a facial challenge, a party must demonstrate that "no circumstances exist under which it would be valid." *Id.* at 161. "A vagueness challenge must be considered in light of the facts at issue." *Id*. This Court has previously held that "[a] penal statute may be unconstitutionally vague if it (1) fails to provide fair notice of the conduct proscribed, (2) permits arbitrary and discriminatory enforcement, or (3) is overbroad and impinges on First Amendment freedoms." *Id.* "In testing a statute challenged as unconstitutionally vague, the entire text of the statute should be examined and the words of the statute should be given their ordinary meanings." *People v Hill*, 269 Mich App 505, 524; 715 NW2d 301 (2006). Generally, "a criminal defendant may not defend on the basis that a statute is unconstitutionally vague where the defendant's conduct is fairly within the constitutional scope of the statute." *Id.* at 525.

Defendant argues that MCL 333.7401c(1)(a) is unconstitutionally vague on its face and as applied to defendant. Defendant asserts that the statute confers unfettered discretion on the trier of fact in deciding what uses of a building are prohibited, that the statute is overboard and impinges on his first amendment right of association, and that the statute does not provide fair notice of the conduct proscribed.

MCL 333.7401c(1)(a) provides in pertinent part that a person shall not "[o]wn, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is

to be used as a location to manufacture a controlled substance . . . ." The plain language of the statute belies defendant's arguments. An individual violates the statute by owning, possessing, or using a vehicle, building, structure, place, or area that he knows or has reason to know is to be used as a location to manufacture a controlled substance, i.e., methamphetamine. Defendant raises several hypothetical scenarios, contending that the statute penalizes individuals who merely visit a location where drugs are being manufactured. Defendant also contends that "[a]n innocent family, living in an apartment, next to the tell-tale smell of a meth lab, would be just as guilty of violating the statute as the person cooking the methamphetamine." Defendant's contentions are unconvincing. The conduct proscribed by MCL 333.7401c(1)(a) requires more than simple visitation of a specified location. A defendant must *own, possess, or use* such a location, and know or have reason to know that the location is used to manufacture a controlled substance. MCL 333.7401c(1)(a) (emphasis added). This statute clearly provides "a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited." *Sands*, *supra* at 163-164. Nor does the statute unduly impinge on a defendant's First Amendment freedom of association. The evidence at trial demonstrated that defendant occupied the barn, and that he knew or had reason to know that the barn was being used as a location to manufacture methamphetamine. Defendant knew this because, as he admitted to the police, he was "cooking" the methamphetamine. In sum, we reject defendant's vagueness challenge. Defendant's illegal conduct fell squarely within the constitutional scope of MCL 333.7401c(1)(a). *Hill*, *supra* at 525. The statute fairly describes the conduct to be regulated, is not overbroad, and does not unduly interfere with the First Amendment freedom of association.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen